In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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10

INDEX

	PAGE
TABLE OF AUTHORITIES	i - ii
PRELIMINARY STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES	2
STATEMENT OF THE CASE	2
ARGUMENT -	
THE COURT BELOW CORRECTLY CONCLUDED THAT PETITIONER'S COUNSELED PLEA OF GUILTY WAS NOT OBTAINED IN VIOLATION OF DUE PROCESS OF LAW BECAUSE THE TRIAL COURT ADVISED HIM OF THE RANGE OF SENTENCING ALTERNATIVES IF HE PROCEEDED TO TRIAL AND WAS FOUND GUILTY OR IF HE PLEADED GUILTY. THERE BEING NO SUBSTANTIAL FEDERAL QUESTION TO BE RESOLVED, CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.	9
CONCLUSION -	
THE PETITION FOR A WRIT OF CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.	17

TABLE OF AUTHORITIES

	Page
Brady v. United States, 397 U.S. 742 [1970]	9, 10, 13, 15, 16
Bordenkircher v. Hayes, ___ U.S. ___, 98 S.Ct. 663 [1978]	10, 11, n.
Brown v. Peyton, 435 F.2d 1352 [4th Cir. 1970]	10, 11
Euziere v. United States, 249 F.2d 293 [10th Cir. 1957]	9
Fambo v. Smith, 433 F. Supp. 590 [W.D.N.Y. 1977], aff'd 565 F.2d 233 [2d Cir. 1977]	10
Harris v. New York, 401 U.S. 222 [1971]	16
Johnson v. Zerbst, 304 U.S. 458 [1938]	13
Machibroda v. United States, 368 U.S. 487 [1962]	9
Massiah v. United States, 377 U.S. 201 [1964]	11
McCall v. United States, 256 F.2d 936 [4th Cir. 1958]	13
McCarthy v. United States, 394 U.S. 459 [1969]	9
McNabb v. United States, 318 U.S. 322 [1943]	11
North Carolina v. Alford, 400 U.S. 25 [1970]	10
Parker v. North Carolina, 397 U.S. 790 [1970]	9
People v. Melton, 35 NY2d 327, 361 N.Y.S.2d 877, 320 N.E.2d 622 [1974]	13
People v. Patterson, 39 NY2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898 [1976], aff'd ___ U.S. ___, 97 S.Ct. 319 [1977]	16
Smith v. United States, 427 F.Supp. 20 [E.D.N.Y. 1976], aff'd, 550 F.2d 883 [2d Cir. 1977]	10
Toler v. Wyrick, 563 F.2d 372 [8th Cir. 1977]	10
Tyler v. Swenson, 427 F.2d 412 [8th Cir. 1970]	9
United States ex rel. Dean v. Wyrick, 426 F. Supp. 1195 [E.D.Mo. 1976], aff'd 563 F.2d 1293 [8th Cir. 1977]	9-10
United States v. Jackson, 390 U.S. 570 [1968]	9
United States v. Kniess, 264 F.2d 353 [7th Cir. 1959]	13
United States ex rel. McGrath v. LaVallee, 319 F.2d 308 [2d Cir. 1963]	11
United States ex rel. McGrath v. LaVallee, 348 F.2d 373 [2d Cir.], cert. den., 383 U.S. 952 [1966]	10

TABLE OF AUTHORITIES - continued

Page

United States ex rel. Miller v. LaVallee, 320 F. Supp. 452 [E.D.N.Y.], aff'd, 436 F.2d 875 [2d Cir.], cert. den., LaVallee v. Miller, 402 U.S. 914 [1970] ..... 13, n.*

United States ex rel. Robinson v. Housewright, 525 F.2d 988 [7th Cir. 1975] ..... 10, 11, 11, n.*

United States ex rel. Rosa v. Follette, 395 F.2d 721 [2d Cir. 1968] 10, 11

United States v. Stockwell, 472 F.2d 1186 [9th Cir. 1973], cert. den., 411 U.S. 948 ..... 13n.*

United States v. Tateo, 214 F.Supp. 560 [S.D.N.Y. 1963] 9, 11, 12

United States v. Werker, 535 F.2d 198 [2d Cir.], cert. den., sub. nom., Santos-Figueroa v. United States, ___ U.S. ___, 97 S.Ct. 330 [1976] ..... 11n.*

Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437 [1948] 13

Wade v. United States, 388 U.S. 218 [1967] 3

Waley v. Johnston, 316 U.S. 101 [1942] 9

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PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review the judgment of the Supreme Court, Kings County entered on the 17th of September, 1976, convicting him, upon his plea of guilty, of the crime of Robbery in the First Degree and sentencing him thereon to a term of imprisonment of not less than six years and not more than twelve years (Held, J., at plea, hearing and sentence).

OPINIONS BELOW

The Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed without opinion, the judgment of conviction and the order is reported at 61 App. Div. 2d 889, 401 N.Y.S.2d 671 [1978]. On the 17th of March, 1978, leave to appeal to the Court of Appeals was denied by Honorable

Charles D. Breitel, Chief Judge.

No opinion was written by the Supreme Court, Kings County.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257[3].

QUESTION PRESENTED.

Whether, under the circumstances of this case, petitioner's counseled plea of guilty was obtained in violation of due process because the trial judge, through petitioner's attorney, advised him of the range of sentencing alternatives if he proceeded to trial or pleaded guilty.

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment XIV.

STATUTES

N.Y. Penal Law §§70.06, and 70.25 [McKinney's 1975]

STATEMENT OF THE CASE.

HAROLD RAMSEY, petitioner herein, was accused by Kings County Indictment Numbers 431/75 and 2588/75 of the crimes of Robbery in the First Degree and related offenses, it being alleged that on the 20th of January, 1975, and on the 30th of December, 1974, petitioner forcibly stole United States Currency from three persons and in the course of the commission of the crimes and of immediate flight therefrom he used and threatened the immediate use of a firearm. A co-defendant was named in the first indictment; it was alleged in the second indictment that petitioner acted alone.

Petitioner pleaded guilty to Robbery in the Second Degree under Kings County Indictment Number 431/1975 to cover the

charges in that indictment and the charges in Kings County Indictment Number 2588/75, three months after the latter indictment was filed. The court conditionally promised to sentence petitioner to a term of imprisonment of not less than three and one-half years to not more than seven years. On the 19th of December, 1975, petitioner was permitted to withdraw his plea of guilty [Vetrano, J., at plea and plea withdrawal].*

On the 4th of August, 1976, petitioner offered to plead guilty to Kings County Indictment Number 2588/75 after the prosecutor moved the indictment to trial, a jury had been selected and the testimony at the Wade hearing had been concluded.** Petitioner pleaded guilty to Robbery in the First Degree to cover all the charges in Kings County Indictment Numbers 2588/75 and 431/75.

At the taking of the plea, the court fully advised petitioner of each of the constitutional rights he was surrendering by pleading guilty. When asked if he understood, petitioner responded "Yes" on each occasion. The following ensued between the court and petitioner:

> THE COURT: Are you satisfied with the legal services rendered on your behalf by your attorney, John Avanzino?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Has anyone forced you, or threatened you or convinced you, against your will, to take this plea of guilty?
>
> THE DEFENDANT: No.

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* As a second felony offender, petitioner was subject to a more substantial sentence than a "first offender". Pursuant to New York Penal Law §70.06[3][b] and [4] [McKinney's 1975], the minimum sentence available to petitioner was a term of imprisonment of not less than three years to not more than six years. Apparently, the first judge to consider these cases did not believe that petitioner deserved the minimum sentence.

** United States v. Wade, 388 U.S. 218 [1967]; N.Y. C.P.L. §710.20[5] [McKinney's, 1971].

THE COURT: Are you pleading because you are guilty and because you are voluntarily doing it?

THE DEFENDANT: Yes.

Petitioner also acknowledged the court's conditional promise to sentence him to a term of imprisonment of not less than six years to not more than twelve years. In response to the court's questions, petitioner indicated his understanding of and his agreement with the promise.

A factual basis for the plea was developed in the record. Petitioner admitted his involvement in the incidents which resulted in the two indictments. He also admitted that on the 30th of December, 1974, he acted alone and threatened the use of a firearm. With regard to the January 20th robbery, petitioner admitted that he acted in concert with another person who had a firearm. He knew that his companion was armed and that they were entering the store to commit a robbery.

Petitioner answered "Yes" when asked if his statement was "truthful", and voluntary. At no time during the plea proceeding did petitioner assert his innocence or claim that his plea was induced by the court's alleged threat to impose the maximum sentence.

Petitioner returned to court on the 17th of September, 1976, for sentencing and moved to withdraw his plea of guilty because he was "...mixed up and confused, upset, acting under duress, misguided, and also he is innocent...". As part of his response to the motion, Mr. Justice Held read portions of the plea proceeding into the record which indicated petitioner's understanding of and satisfaction with the proceeding and the disposition of his two indictments. The court concluded the review by asking petitioner if he had lied at the taking of the plea to which he responded, "Yes, I am telling you this. You want to let me talk now?"

At this point, the court's efforts to elicit responses from petitioner became fruitless. He became abusive, accused the court of intimidating his lawyer "...in front of the Jury..."and called the Judge a "gangster". Petitioner vehemently protested his innocence and claimed that,

> [t]he only reason I took my plea is because I was coerced.
>
> You also told my lawyer if I have a trial you will give me twelve to twenty-five years, and he told me that.

After being adjudged in contempt because of his disruptive and obscene behavior, petitioner continued to antagonize the court:

> You ain't sentencing me, man. You ain't brushing me off like Al Capone or some other man. This motherfucker is prejudicial and roughing me off and you don't trust me because you are a sap. You understand this, motherfucker?
>
> You won't let me take my plea back. This motherfucker is not a Judge, he is a dictator. He should have been with Mussolini and Hitler.

Petitioner was gagged and the court continued the inquiry with petitioner's attorney, John Avanzino, Esq.

Mr. Avanzino reminded the court that prior to the Wade hearing he conveyed to his client the original plea offer of Robbery in the Second Degree with a sentence promise of three and one-half years to seven years "...subject, of course, of [sic] [the court] looking at the probation report." The offer was rejected by petitioner and he claimed that he was innocent.

Plea negotiations were re-commenced after the People rested at the Wade hearing. The court offered a plea to Robbery in the First Degree with a sentence promise of "...six to twelve years with the District Attorney's approval." The following

then ensued between the court and petitioner's attorney:

> MR. BAVANZINO [sic]: ... We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at the time I did, Judge. I gave him that warning.
>
> THE COURT: Subject of course of [sic] me reading the probation report. It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. [Emphasis supplied].

However, upon learning that this was purportedly the reason that petitioner pleaded guilty, the court inquired further of counsel concerning petitioner's protestations of innocence.

> THE COURT: Are you telling me that you knew when he pleaded guilty, that he was not actually guilty?
>
> MR. BAVANZINO [sic]: I did not know that, your Honor, we can never know anything about a client. We have to go by what the client tells us.
>
> THE COURT: That is exactly the point I am trying to make with you.
>
> When he pleaded guilty, you believed him to be guilty?
>
> MR. BAVANZINO [sic]: I assumed as Your Honor did that he was guilty. I assumed that.

Mr. Justice Held denied petitioner's application to withdraw his plea.

Prior to sentencing him to six to twelve years imprisonment, Mr. Justice Held read into the record petitioner's pre-sentence report which the court had previously reviewed. The report indicated that petitioner, who was then twenty-four years old, had a juvenile delinquency record dating back to 1965. As an adult, petitioner was adjudicated a Youthful Offender for an Attempted Grand Larceny. In 1971, he was convicted of Robbery and Grand

Larceny in the Third Degree. As a parolee and a predicate felon, petitioner committed the crimes which were the subject matter of this plea.

The pre-sentence report listed several reasons given by petitioner for pleading guilty. First, he alleged that he was "beaten up" by the arresting officer. Second, petitioner "accepted the plea for the purposes of his own convenience..." He also feared the imposition of the maximum sentence if convicted after a trial. Third, the court's decision at the Wade hearing was prejudicial. [No decision had been made when the plea was offered]. Fourth, the court prejudiced the jury during their selection.

Petitioner's reasons for wanting to withdraw his plea of guilty were also listed in the pre-sentence report. First, petitioner claimed that he did not commit the crimes charged in the two indictments. Second, he pleaded guilty "...on the advise [sic] of his lawyer, and was tired of being in jail." Third, the sentence promised by the court was excessive "...especially so because his co-defendant in Indictment 431 of 1975 was sentenced to two to four years." However, petitioner stated that "three and a half to seven years would be acceptable to him and he is considering [sic] to withdraw his plea if Your Honor follows through with the promise of six to twelve."

The court noted that petitioner underwent psychiatric examinations "...in connection with..." the two cases, pursuant to N.Y. C.P.L. Art. 730 (McKinney's 1971) and was admitted to Mid-Hudson Psychiatric Center from April, 1975 to June, 1975. He was subsequently found to be a malingerer and fit to proceed in July, 1975.

Mr. Justice Held sentenced petitioner, as promised, to a term of imprisonment of not less than six years to not more than twelve years. The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and leave to appeal to the Court of Appeals has been denied. Petitioner now seeks a writ of certiorari to review the question of whether his counseled plea of guilty was obtained in violation of due process of law.

ARGUMENT

THE COURT BELOW CORRECTLY CONCLUDED THAT PETITIONER'S COUNSELED PLEA OF GUILTY WAS NOT OBTAINED IN VIOLATION OF DUE PROCESS OF LAW BECAUSE THE TRIAL COURT ADVISED HIM OF THE RANGE OF SENTENCING ALTERNATIVES IF HE PROCEEDED TO TRIAL AND WAS FOUND GUILTY OR IF HE PLEADED GUILTY. THERE BEING NO SUBSTANTIAL FEDERAL QUESTION TO BE RESOLVED, CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Petitioner's challenge to the validity of his counseled plea of guilty raises the issue of whether, in the abstract, due process is violated whenever a trial judge advises an accused that if he is found guilty after a trial he will receive a sentence in excess of the sentence which would be imposed if he pleaded guilty. Petitioner also asks this Court to define the contours of proper judicial participation in plea bargaining.* While respondent recognizes that some instances of judicial interference may offend due process (see, e.g., Tyler v. Swenson, 427 F.2d 412 [8th Cir. 1970]; Euziere v. United States, 249 F.2d 293 [10th Cir. 1957]; United States v. Tateo, 214 F. Supp. 560 [S.D.N.Y. 1963] [Weinfeld, J.]), the case at bar is not such a case.

The law is well-settled that a plea of guilty which has been coerced is incompatible with due process and must be vacated [see, e.g., Waley v. Johnston, 316 U.S. 101 [1942]; Machibroda v. United States, 368 U.S. 487, 493 [1962]; United States v. Jackson, 390 U.S. 570 [1968]; McCarthy v. United States, 394 U.S. 459, 466 [1969]; and, Brady v. United States, 397 U.S. 742 [1970]). The law is equally well-settled that "...an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial." (Parker v. North Carolina, 397 U.S. 790, 795 [1970]. See, also, United States ex rel. Dean v. Wyrick,

* See, infra at p. 11, n.*

426 F. Supp. 1195 [E.D. Mo. 1976] aff'd, 563 F.2d 1293 [8th Cir. 1977]; Smith v. United States, 427 F. Supp. 20, 23 [E.D.N.Y. 1976], aff'd, 550 F.2d 883 [2d Cir. 1977]). As noted by this Court in North Carolina v. Alford, 400 U.S. 25, 31 [1970]:

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant [citations omitted]. That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

(Cf. Bordenkircher v. Hayes, ___ U.S. ___, 98 S. Ct. 663, 667 [1978]).

The voluntariness of petitioner's plea can be determined only by considering all of the relevant circumstances surrounding it [see, e.g., Brady v. United States, supra, 397 U.S. at 749; and Fambo v. Smith, 433 F. Supp. 590, 595 [W.D. N.Y. 1977]), aff'd, 565 F.2d 233 [2d Cir. 1977]. The participation by a trial judge in plea bargaining does not, in and of itself, require setting a guilty plea aside. It is only one factor to be considered in determining whether the plea was voluntary (see, e.g., Toler v. Wyrick, 563 F.2d 372, 373, 374 [8th Cir. 1977]; United States ex rel. Robinson v. Housewright, 525 F.2d 988 [7th Cir. 1975]; Brown v. Peyton, 435 F.2d 1352 [4th Cir. 1970]; United States ex rel. Rosa v. Follette, 395 F.2d 721, 725 [2d Cir. 1968]; and, United States ex rel. McGrath v. LaVallee, 348 F.2d 373 [2d Cir. 1965], cert. den., 383 U.S. 952 [1966].

See, also, United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 315 [2d Cir. 1963] [Friendly, C.J., concurring and dissenting]).*

In the final analysis, the question to be resolved is not so much whether the judge participated in the plea discussions but, rather, what was said and its probable effect (see, United States ex rel. McGrath v. Lavallee supra, 319 F.2d at 315; United States ex rel. Rosa v. Follette, supra, 395 F.2d at 725; United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991-992; and, United States v. Tateo, supra).**

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* In the federal system, the law is settled that a district judge shall not participate in any plea discussions (see, Fed. Rules Cr. Proc. rule 11(e)(1), 18 U.S.C.A. [West 1975]; and United States v. Werker, 535 F.2d 198 [2d Cir. 1976], cert. den., sub. nom., Santos-Figueroa v. United States, ___ U.S. ___ 97 S. Ct. 330 [1977]). Moreover, this Court (see, e.g., McNabb v. United States, 318 U.S. 322, 340-341 [1943] and the several courts of appeals (see, e.g., United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991) may promulgate rules pertaining to the administration of criminal justice in the federal courts. Neither this Court nor the courts of appeals have such supervisory authority over courts of the several states [see, e.g., McNabb v. United States, supra, 318 U.S. at 340-341; and United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991]. Finally, the ABA Standards relating to Pleas of Guilty, §3.3 [Approved Draft 1968], also recommend that a trial judge not participate in plea negotiations. The standards do not state a constitutional limitation but rather prescribe a rule of practice (see, e.g., Brown v. Peyton, supra, 435 F.2d at 1357. Cf. Massiah v. United States, 377 U.S. 201, 210 [1964][White, J., dissenting). Accordingly, the only question before this Court is whether, under the circumstances of this case, due process was violated. (See, e.g., Bordenkircher v. Hayes, supra, 98 S. Ct. at 669. If due process was not violated, formulation of the contours of proper judicial involvement should be left to the states (see, e.g., United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991-992).

** We disagree with petitioner's characterization of Mr. Justice Held's statement to him concerning the sentencing alternatives (see, infra at p. 14). Assuming, arguendo, that the intent of the court's statement was to coerce a plea, the inquiry should not end at that point. The probable effect of the statement is the primary factor to be considered.

The record in the case at bar amply supports the conclusion that petitioner's plea was not coerced by the trial court's statement concerning the sentence. At the taking of the plea, petitioner, who was represented by counsel,* signaled his understanding of the legal consequences of his decision to plead guilty. Petitioner acknowledged that his plea was voluntary and was being offered because he was guilty. A factual basis for the plea was developed by the court. Lastly, petitioner stated that he was relying on no promise other than Mr. Justice Held's conditional promise concerning the sentence to be imposed. ** To be sure, these admissions are evidential on the issue of voluntariness (see, e.g., United States v. Tateo, supra, 214 F. Supp. at 564 [citations omitted]).

It should also be noted that petitioner had been incarcerated for eighteen months when he offered to plead guilty in August, 1976. *** In September, 1975, he had pleaded guilty to the same consolidated indictment and withdrew that plea three months later. Thus, within one year, petitioner twice admitted his guilt, affirmatively providing a factual basis for the plea and satisfactorily answering the court's questions. The absence of any of the indicia of innocence at the time of the taking of the plea raises questions concerning the belated assertion of

* Petitioner stated on the record that he was satisfied with his legal representation.

** The court reserved the right to break the promise "...if it turns out that I feel that I have to." Petitioner was advised that in such a case he would have the right to withdraw his plea and wipe "...the slate clean...".

*** It is no wonder, considering his criminal history and the length of his most recent incarceration, that petitioner told the probation officer who was writing the pre-sentence report that he wanted to withdraw his plea because he "...was tired of being in jail...". See, also, infra at. p. 14-15.

innocence. Indeed, defense counsel admitted to Mr. Justice Held that when the plea of guilty was offered, he assumed that petitioner was guilty.

Secondly, the plea was offered after a jury had been selected and an identification witness for the prosecution had concluded her testimony at the Wade hearing. In Brady, supra, 397 U.S. at 756, this Court recognized that,

> [o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted.*

Petitioner may well have preferred to plead guilty, recognizing that his chances for acquittal were slight, and thereby avail himself of a more lenient sentence. Such considerations do not militate against a finding that the plea was voluntary [Id. at 750-751].

Thirdly, petitioner was represented by counsel, was twenty-four years old, and already had an extensive criminal record, including adjudications as a juvenile delinquent and as a Youthful Offender, and a robbery conviction as an adult offender (see, e.g., Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 442 [1948]; Johnson v. Zerbst, 304 U.S. 458, 464 [1938]; United States v. Kniess, 264 F.2d 353 [7th Cir. 1959]); McCall v. United States, 256 F.2d 936 [4th Cir. 1958]).**

* It is widely recognized that an accused who pleads guilty will receive a lighter sentence than if he chooses to go to trial and put the state to its proof (see, e.g., United States v. Stockwell, 472 F.2d 1186 [9th Cir. 1973], cert. den., 411 U.S. 948; United States ex rel. Miller v. LaVallee, 320 F. Supp. 452 [E.D.N.Y., aff'd, 436 F.2d 875 [2d Cir.], cert. den. LaVallee v. Miller 402 U.S. 914 [1970]; United States v. Rodriguez, 429 F. Supp. 520, 524, n.5 [S.D.N.Y. 1973]; and, People v. Melton, 35 N.Y.2d 327, 330, 361 N.Y.S. 2d 877, 880, 320 N.E. 2d 622 [1974]).

** Petitioner was on parole when he committed the crimes which were the subject matter of his plea.

Surely, as a predicate felon (see, e.g., N.Y. Penal Law §70.06 [McKinney's 1975]), petitioner was aware that a conviction, after trial, of robbery in the first degree would result in a maximum term of imprisonment of at least nine years to not more than twenty-five years (N.Y. Penal Law, § 70.06 [3][a] [McKinney's 1975]), and a mandatory minimum period of one-half of the maximum term (N.Y. Penal Law §70.06 [4] [McKinney's 1975]).

Moreover, petitioner was accused in two separate indictments of the crime of Robbery in the First Degree and other related offenses which were allegedly committed on different dates. If convicted, petitioner could have received the aforementioned sentences, to be served consecutively (N.Y. Penal Law §70.25 [McKinney's 1975]).*

Under these circumstances, Mr. Justice Held's statement that, subject to the pre-sentence report, he would sentence petitioner, if convicted after trial, to a term of imprisonment of twelve and one-half years to twenty-five years could hardly have come as a surprise to him. In short, petitioner was merely informed of the reality of his situation - a reality which could not have been unknown to him.

Fourth, petitioner's belated assertion of innocence is seriously undercut by his statements to the Probation Department after the plea was accepted by the court. He claimed that one reason for his decision to withdraw his plea was that he believed his sentence was excessive "...especially so because his co-defendant in [sic] indictment 431 of 1975 was sentenced to [sic] two to four years." However, he indicated that "three and a half to seven years (the original sentence promise twice rejected)

* Only one of the indictments had been moved to trial. However, the plea bargain included the second indictment.

would be acceptable to him...".

In our view, the record strongly suggests that, instead of being coerced into pleading guilty, petitioner was trying to secure the best deal up to the last possible moment. As noted above, petitioner "...was tired of being in jail...".

Petitioner's communications with the Probation Department raise questions about his protestation of innocence in that they were in direct conflict with factual assertions made by petitioner at the plea proceeding and with a fact established at the time of his arrest. Petitioner told the Department that he had not known that that his companion was in possession of a firearm and that he himself was unarmed. At the plea, petitioner stated that "the co-defendant had a weapon", and admitted that he was aware of the possession and that he knew that they were about to commit a robbery. The pre-sentence report revealed that petitioner was found in possession of a knife when he was arrested.

Lastly, petitioner's psychiatric reports indicated that he was a manipulator and a malingerer. His abusive and contemptuous behavior in the courtroom, which resulted in a contempt citation by the court, only serve to corroborate these reports. What emerges from the record is a shrewd and experienced plea-bargainer rather than an intimidated and coerced victim of an over-bearing judge.

Petitioner's reliance on the qualifying language found at p. 751, n.8 of this Court's opinion in Brady v. United States, supra, is misplaced. Assuming, without conceding, that the language may be read as suggesting that a different result might have been reached had a reluctant Brady tendered his guilty plea only after the trial judge made a statement about the sentence to be imposed if a jury returned a guilty verdict (see

Petition at p.6, n.), "...discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling." (Harris v. New York, 401 U.S. 222, 224 [1971]. See, also, People v. Patterson, 39 N.Y.2d 288, 303, 383 N.Y.S 2d 573, 583, 347 N.E.2d 898 [1976], aff'd, ___ U.S. ___, 97 S. Ct. 319 [1977] [It is basic to our common law system that a court decides only the case before it].

The record of the proceedings in the case at bar demonstate that the plea was not the product of "...mental coercion overwhelming the will of the [petitioner]." (Brady v. United States, supra, 397 U.S. at 750). Petitioner who was at all times represented by able counsel and was himself experienced in the intricacies of the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and realized that his chances of acquittal were slight. When viewed in this context, the court's comments pertaining to the sentencing alternatives, could not have had the effect petitioner belatedly ascribed to them. Petitioner's conduct throughout the pendency of the two indictments compels the conclusion that, rather than being coerced into pleading guilty, he was a wily bargainer seeking the best possible deal. Accordingly the affirmance of petitioner's conviction by the Appellate Division of the Supreme Court of the State of New York was in all respects correct. The petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Dated: Brooklyn, New York
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